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IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case No. 3:16-cv-03777-LB
	)	
Petitioner,	)	<b>REPLY TO FACEBOOK'S</b>
	)	<b>OPPOSITION TO AMENDED</b>
v.	)	<b>PETITION TO ENFORCE</b>
	)	<b>INTERNAL REVENUE SERVICE</b>
FACEBOOK, INC. AND SUBSIDIARIES	)	<b>SUMMONSES</b>
(a Consolidated Group),	)	
	)	<b>DATE: November 17, 2016</b>
Respondent.	)	<b>TIME: 9:30 a.m.</b>
	)	<b>DEPT: Courtroom 15-C</b>

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**I. FACEBOOK’S FULL COMPLIANCE WITH THE SUMMONSES IS REQUIRED BY LAW**

Facebook indicates that it will comply with the summonses at issue. To the extent Facebook intends to fully comply, there is no reason to delay entry of an order enforcing the summonses. Such an order could also address Facebook’s request for a timetable to produce responsive documents, and, if need be, to brief disputes over claims of privilege.<sup>1</sup>

Irrespective of Facebook’s intentions, the United States is entitled to full compliance with the seven summonses. The United States has set forth a *prima facie* case for enforcement. (Show Cause Order ¶ 3, Dkt. No. 8). Accordingly, the summonses must be enforced as a matter of law unless Facebook shows that enforcement would be an “abuse of process, *e.g.*, that the summons[es] [were] issued in bad faith for an improper purpose.” *Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985) (“The burden is a heavy one.”) Facebook’s Opposition filings do not meet this heavy burden. Indeed, Facebook makes clear that it is not challenging the IRS’s “nominal ability to enforce the seven [s]ummonses pursuant to *United States v. Powell*, 379 U.S. 48, 57-58 (1964).” (Opposition at 11:6-7). An order enforcing the summonses should therefore follow.

**II. THE SUMMONSES CLEARLY IDENTIFY CATEGORIES OF DOCUMENTS TO BE PRODUCED AND ARE NOT OVERLY BROAD**

Facebook nevertheless challenges the scope of the requests contained in the summonses, arguing that the summons requests are overly broad and lacking in specificity. It is not clear how

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<sup>1</sup> The United States does not object to the inclusion of language in a case management order applying the same standards for waiver of the attorney-client privilege or work product protection afforded to Facebook in this proceeding to other federal or state proceedings. *See* Rule 502(d) of the Federal Rules of Evidence. Nor does the United States object to such an order establishing a similar standard for waiver of the tax practitioner privilege, pursuant to the Federal Rules of Civil Procedure, Local Rules and the inherent powers of the Court.

1 these challenges dovetail with Facebook’s intention to comply with the summonses, but, in any  
2 event, the challenges lack merit.

3 Overbreadth, in the context of a summons enforcement proceeding, is not a question of  
4 volume. Seeking a large volume of documents is entirely permissible, where the information  
5 sought is relevant<sup>2</sup> to the examination. *See United States v. Luther*, 481 F.2d 429, 433 (9th Cir.  
6 1973) (“The fact that the records called for were extensive is not material.”); *see also United*  
7 *States v. Ruggeiro*, 425 F.2d 1069, 1071 (9th Cir. 1970); *United States v. Henkell*, No. 96-314-  
8 WBS-GGH, 1997 WL 401519 at \*6 (E.D. Cal. Apr. 2, 1997). Rather, overbreadth is a question  
9 of whether summonses describe the requested documents in enough detail to inform the  
10 summoned party of exactly what is to be produced. *See United States v. Abrahams*, 905 F.2d  
11 1276, 1281-86 & n.6 (9th Cir. 1990), *overruled on other grounds, United States v. Jose*, 131 F.3d  
12 1325 (9th Cir. 1997); *see also Fisher v. United States*, 676 F. Supp.2d 1165, 1171 (W.D. Wash.  
13 2009) (*quoting United States v. Wyatt*, 637 F.2d 293, 302 n. 16 (5th Cir. 1981)); *Henkell*, 1997  
14 WL 401519 at \*6.

15 That the summons requests seek a relatively large volume of documents should come as  
16 no surprise. The requests seek information regarding Facebook’s 2010 transfer to Facebook  
17 Ireland of hard-to-value intangible assets, including the company’s rest-of-world international  
18 “user base” and related rights to exploit Facebook’s “platform technology.” (*See Amended*  
19 *Declaration of Nina Wu Stone*, Dkt. No. 7-1, ¶¶ 23-43) (the “Stone Decl.”). The transfers gave  
20 rise to complex international tax issues and have presented IRS examiners with the difficult

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21  
22 <sup>2</sup> Relevance in the summons context is a more expansive concept than it is in civil litigation. The IRS need only  
23 show that the information sought may be relevant. 26 U.S.C. § 7602(a); *see also United States v. Arthur Young & Co.*, 465 U.S. 805, 813-15 & n. 11 (1984) (documents relevant if they “might have thrown light” on an issue). Facebook has not challenged the relevance of the requested information.

1 challenge of understanding the nature and value of transferred assets, as well as related  
2 businesses utilizing those assets. IRS efforts continue in this regard.

3 Moreover, the transferred assets are believed to have had a collective value running into  
4 the billions of dollars, even in 2010. (*See* Stone Decl. ¶ 31). When placed in the context of large  
5 scale multinational transactions, the IRS's examination of Facebook was not unusual or out of  
6 the ordinary for a large coordinated industry case audit of this type, either in terms of the number  
7 of document requests issued or the duration of the examination. (Declaration of Nancy Bronson  
8 dated October 24, 2016, ¶ 4). Indeed, it is not unusual for a continuous and ongoing audit  
9 relationship between the IRS and the large multinational corporate taxpayer to exist. (*See*  
10 Bronson Decl. ¶ 1).

11 Here, the summons requests ask for readily-identifiable sets of documents relating to the  
12 transfers of user base, marketing and platform technology intangible assets to Facebook Ireland  
13 and the value accruing to Facebook Ireland as a consequence of the transfers. In some instances,  
14 the IRS requests are so specific that names, terms and particularized citations to witness  
15 statements, which provide context or definitional clarity, have been redacted to protect  
16 Facebook's proprietary information.<sup>3</sup>

17 For example, Request No. 7 in Summons No. 2 seeks information that may shed light on  
18 why Facebook's most valuable international assets were transferred to Facebook Ireland:

19 All Documents constituting, reflecting, or referring to communications by or  
20 between any of Taxpayer's business executives or managers regarding Taxpayer's  
decision to make Dublin, Ireland or other countries or locations abroad the

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21  
22 <sup>3</sup> Redactions were made as a result of pre-filing consultation with counsel for Facebook. The redacted versions of  
23 the summonses were filed with the petition as an accommodation to Facebook, and it would be unfair for Facebook  
to use those redactions against the United States to further its claim that requests lack specificity. Clean un-redacted  
copies will be provided to the Court upon request or should the need arise at the scheduled hearing.

1 headquarters for its business operations outside of the United States and Canada.  
[Footnote]

2 [Footnote: See Transcript of examination under oath of [redacted] at Taxpayer, p.  
3 71 (stating that [redacted] was responsible for the decision to make Dublin the  
4 international headquarters of Taxpayer).]

(Ex. 2 to Stone Decl., Dkt. No. 7-3 at PDF p. 12/26).

5 Request No. 8 in Summons No. 2 (among other requests in the seven summonses) has a  
6 similar focus:

7 All Documents constituting, reflecting, or referring to reports and data reviewed  
8 or considered by any of Taxpayer's business executives or managers in connection  
9 with Taxpayer's decision to make Dublin, Ireland or other countries or locations  
10 abroad the headquarters for its business operations outside of the United States  
and Canada.

(Ex. 2 to Stone Decl., Dkt. No. 7-3 at PDF p. 12/26).

11 Many of the requests seek the type of business information that may well inform efforts  
12 to properly value transferred assets. Request No. 4 in Summons No. 3 states:

13 According to Ms. [redacted], Taxpayer built “forecasts,” from internal and  
14 external data, projecting Taxpayer’s [redacted] on a country-by-country basis, so  
15 that Taxpayer could look at the forecasts, “U.S. versus international.” She said  
16 she has seen both year-long and three year forecasts.[Footnote] Please provide all  
Documents constituting, reflecting or referring to any such “forecasts” of growth  
of [redacted], created, obtained or circulated in

- 17 a. 2008
- 18 b. 2009
- 19 c. 2010
- d. 2011
- e. 2012.

20 [Footnote: See Transcript of examination under oath of [redacted] at Facebook  
US, p. 44]

21 (Ex. 3 to Stone Decl., Dkt. No. 7-4 at PDF p. 11/30).

22 This type of request, and a number of other similar requests that ask for business  
23 information which may be material to valuation considerations, may not be to Facebook’s liking,

1 and may entail electronic searches or even production of significant volumes of responsive  
2 documents. But the description of what is being sought could not be clearer, with the IRS having  
3 even directed the company to particular references in transcripts or other documents in order to  
4 prevent any ambiguity as to the meaning of the requests.

5 In short, Facebook's overbreadth challenge is without merit.

6 **III. FACEBOOK CUT SHORT THE EXAMINATION PROCESS BY**  
7 **REFUSING TO EXTEND THE STATUTE OF LIMITATIONS**

8 The examination of Facebook's tax year ending December 31, 2010 commenced during  
9 January 2013. (Stone Decl. ¶ 20). The examination team gathered information during 2013 and  
10 2014 and presented a preliminary position to Facebook during a meeting held on April 17, 2015.  
11 (*Id.* at ¶¶ 26-27).

12 Facebook's May 27, 2015 critique went beyond alleged "arbitrary errors" or mere  
13 computational disagreements. Facebook raised substantive matters for consideration by the IRS.  
14 (Stone Decl. ¶¶ 29-30). That the IRS decided to seek assistance from outside experts and give  
15 issues raised by Facebook serious consideration is not something for which the IRS should be  
16 criticized. (*See* Stone Decl. ¶¶ 30-32; Bronson Decl. ¶ 5). Rather, the examination team should  
17 be commended for its diligence.

18 To expedite efforts, the IRS began a preliminary search to identify possible outside  
19 experts before October 1, 2015; however, due to budgetary constraints, the examination team  
20 was unable to commence the expert retention process for the audit until the beginning of a new  
21 fiscal year on October 1, 2015. (Stone Decl. ¶ 32; Bronson Decl. ¶ 5). Because of these  
22 constraints, the IRS asked Facebook to extend the statute of limitations. An extension would  
23 provide time to confer with experts and follow up with any additional requests for information to



1 Facebook. (Stone Decl. ¶ 32). Facebook, however, refused to any such extension, unless the  
2 IRS committed to issuance of a thirty-day letter.<sup>4</sup> (Bronson Decl. ¶ 6).

3 On February 4, 2016, the IRS met with Facebook representatives and discussed the IRS's  
4 request for an extension. During the meeting, IRS Territory Manager Nancy Bronson explained  
5 that the IRS was requesting additional time in order to allow the examination team to complete  
6 development of a factual record that would, among other things, take into account issues raised  
7 by Facebook's representatives during a May 27, 2015 presentation. (Bronson Decl. ¶ 8).

8 Ms. Bronson also explained that the additional requested time was needed in order to  
9 obtain the insight and assistance of outside experts. Ms. Bronson further indicated that because  
10 the IRS contracting process had not been completed, any specific timeline that the IRS might  
11 provide for completion of the examination would not be reliable. She added the IRS would be  
12 willing to provide an estimated timeline for completion of the examination once experts had an  
13 opportunity to review the record and consider the need for additional information. (Bronson  
14 Decl. ¶ 9).

15 Ms. Bronson also made clear to Facebook's representatives that the although the IRS  
16 could not commit to issuance of a 30-day letter at the conclusion of the examination, the IRS had  
17 not in any way ruled out issuance of such a letter, nor made any decision with respect to the  
18 alternative of designating Facebook's case for litigation. Consideration of such matters could not  
19 be made until the factual record was complete.<sup>5</sup> (See Bronson Decl. ¶ 9-10).

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21 <sup>4</sup> A 30-day letter affords a taxpayer an opportunity to appeal adjustments proposed by an IRS examination team to  
22 the IRS Office of Appeals. The taxpayer has 30 days to make the request for an appeal. (Bronson Decl. ¶ 7).

23 <sup>5</sup> Procedures to designate for litigation non-docketed cases during the course of an examination are rigorous. Such a  
designation forecloses the issuance of a 30-day letter. But at no time did Ms. Bronson initiate any request to  
designate Facebook for litigation. (Bronson Decl. ¶ 11).

1 On May 18, 2016, Ms. Bronson again met with Facebook representatives and asked them  
2 to reconsider their decision not to extend the statute. Facebook, however, was unwilling to  
3 extend the statute unless the IRS committed to a completion date for the examination and  
4 guaranteed issuance of a 30-day letter. (Bronson Decl. ¶ 12).

5 The next day, on May 19, 2016, Facebook indicated that it would be willing to grant a  
6 statute extension to January 31, 2017 if, in return, the IRS refrained from issuing a designated  
7 summons, a mechanism that, subject to certain conditions, may result in the suspension of the  
8 running of a statute of limitations. A meeting followed on May 23, 2016. Ms. Bronson  
9 explained that the IRS was seeking additional time but did not want to give up the right to issue a  
10 designated summons in light of difficulties encountered previously in obtaining information from  
11 Facebook in a timely manner and the short period of the proposed extension. (Bronson Decl.  
12 ¶ 14).

13 At an impasse, and with the statute of limitations about to run, the IRS issued a notice of  
14 deficiency to Facebook on July 26, 2016, based on the information available to the examination  
15 team at the time. This deficiency notice, however, does not constitute a final determination of  
16 Facebook's 2010 tax liability because, among other reasons, the examination team had not  
17 completed its fact gathering efforts when the clock ran out. (Bronson Decl. ¶ 15). Although one  
18 of the IRS's outside experts had been retained as of late March 2016, and the other as of May  
19 2016 (Bronson Decl. ¶ 5), Facebook did not provide the records requested through IDRs dated  
20 April 7, 2016 (and ensuing summonses issued in June 2016) needed by the IRS examination  
21 team (and its outside experts), to complete its work. (Stone Decl. ¶¶ 35-43). Accordingly, the  
22 determinations in the notice are subject to revision or amendment, if information still needed to  
23 complete and support the determinations made in the notice require it. (Bronson Decl. ¶ 15).

1 Case law permits the IRS to enforce summonses seeking information needed to  
 2 accurately determine an income tax liability, even after issuance of a notice of deficiency, and  
 3 even after commencement of a proceeding in Tax Court. *United States v. Richey*, 632 F.3d 559,  
 4 565-66 (9th Cir. 2011); *Sterling Trading, LLC v. United States*, 553 F. Supp.2d 1152, 1159-60  
 5 (C.D. Cal. 2008). As stated in *Richey*,

6 [E]ven though the IRS's investigation had ostensibly concluded, the IRS had a  
 7 legitimate reason to seek documentation essential to establishing the [taxpayers']  
 8 tax liabilities. Thus, as long as the amount the [taxpayers] allegedly owed to the  
 IRS was subject to change, the IRS had a good-faith interest in obtaining [the  
 summoned documents] pursuant to the summons.

9 See also *Sugarloaf Funding, LLC v. United States*, 584 F.3d 340, 349 (1st Cir. 2009); *United*  
 10 *States v. Gimbel*, 782 F.2d 89, 93 (7th Cir. 1986).

11 The prospect of an eventual court challenge to an audit determination in no way  
 12 constrains or deprives the IRS of its authority to summon information. *PAA Mgmt., Ltd. v.*  
 13 *United States*, 962 F.2d 212, 219 (2d Cir. 1992); *Sterling Trading LLC*, 553 F. Supp.2d at 1159-  
 14 60. In fact, provided that summonses issue prior to commencement of a proceeding in Tax  
 15 Court, the IRS is entitled to enforce properly issued summonses even after the commencement of  
 16 Tax Court proceedings. See *id.* As the Tax Court stated in *Ash v. Comm'r*, 96 T.C. 459, 472  
 17 (1991):

18 The development of additional evidence through the summonses in issue will in  
 19 fact benefit this Court's processes because it will result in a more fully developed  
 20 factual background in which to consider petitioner's case. The additional  
 evidence may also lead to the settlement of the case.

21 As a matter of black-letter law, even when a taxpayer challenges a summons alleging that  
 22 the IRS is seeking to circumvent discovery rules and prepare for litigation, courts may presume  
 23 the summons is valid, provided it was issued before commencement of Tax Court proceedings,  
 and in the absence of direct evidence to the contrary. See *Sterling Trading LLC*, 553 F. Supp.2d

1 at 1159-60 (disregarding an allegation that IRS Counsel “planned to litigate regardless of the  
 2 results of the audit”). By applying an objective test, courts do not have to get into the business of  
 3 “evaluating the efficiency of the [IRS’s] investigative process.” *PAA Mgmt. Ltd. v. United*  
 4 *States*, 817 F. Supp. 425, 427 (S.D.N.Y. 1993).

5 Here, Facebook does not challenge that the IRS issued the summonses for the legitimate  
 6 purpose of completing the fact gathering process in order to make an accurate determination of  
 7 Facebook’s income tax liability and properly support that determination with a completed record.

#### 8 **IV. FACEBOOK IS OBLIGATED TO ENGAGE IN GOOD-FAITH** 9 **EFFORTS TO FULLY COMPLY WITH THE SUMMONS REQUESTS**

10 Facebook’s Opposition describes, at some length, its efforts to locate documents  
 11 responsive to the summons requests. That is all to the good, and the undersigned counsel for the  
 12 United States anticipates continuing a constructive dialogue with counsel for Facebook to ensure  
 13 that reasonable efforts are made to locate and produce electronically stored documents. But  
 14 Facebook is not entitled to unilaterally decide on the universe of custodial records to search and  
 15 the search terms to be utilized in finding responsive documents.

16 Facebook proposed search terms and custodians for IDRs 178-187 on April 27, 2016.  
 17 (Bronson Decl. ¶ 16). The IRS then met with Facebook’s representatives on May 10, 2016, May  
 18 13, 2016 and June 14, 2016 to discuss Facebook’s proposals. (Bronson Decl. ¶ 17). By meeting  
 19 with Facebook, the IRS hoped to better understand how Facebook stored records and to facilitate  
 20 a process that would lead to an efficient production of documents. (*Id.*)

21 During the course of the meetings, the IRS gained the impression that Facebook did not  
 22 have a centralized records system, archival record retention policies, or easily locatable hard  
 23 copy files or shared drives of departments from which responsive documents could be retrieved.

1 The IRS further gained the impression that the only reliable way to find responsive documents  
2 was through an Outlook search of particular custodians. (Bronson Decl. ¶ 18).

3 The participants in the meetings spent significant time and effort discussing search terms  
4 and custodians for the document requests. The IRS attempted to understand the search  
5 capabilities of the Outlook database on which searches would be conducted to determine how  
6 effective searches could be created to identify and produce relevant and responsive documents.  
7 But there was some confusion as to the capabilities of the search system. (Bronson Decl. ¶ 19).

8 Notwithstanding the meetings, the IRS did not receive adequate information regarding  
9 Facebook's search capabilities and proposed custodians to formulate a written response prior to  
10 the issuance by Facebook of a letter dated June 17, 2016. In that letter, Facebook made clear that  
11 it was not interested in further dialogue regarding these matters and would unilaterally move  
12 forward with its custodian selections and proposed searches. (Bronson Decl. ¶ 20).

13 Importantly, the IRS attendees at the meetings gained the impression that the searches  
14 under discussion would produce large volumes of documents, many of which would be non-  
15 responsive, potentially overwhelming the IRS. Ms. Bronson gained the impression that  
16 Facebook intended to produce documents returned by these searches unfiltered for  
17 responsiveness to particular document requests. (Bronson Dec. ¶18). The impression that  
18 documents would be produced unfiltered was consistent in Ms. Bronson's mind with Facebook's  
19 insistence on producing documents subject to a Rule 502 agreement which might allow  
20 Facebook to dump volumes of documents on the IRS, leaving the IRS uncertain as to which  
21 documents might be privileged and also providing Facebook the opportunity to seek privilege  
22 protection after the fact. (*See id.*)  
23

For the reasons set forth above, the Court should enter an order enforcing the seven summonses and establishing a timetable for production of responsive documents and, if need be, for briefing any disputes over claims of privilege asserted by Facebook.

**(signatures on next page)**

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**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that service of the foregoing Reply, along with the Declaration of Nancy Bronson, has been made this 25th day of October, 2016, via the Court's ECF system to all parties.

/s/ James E. Weaver  
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